

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

## MAURICE PETER EUNICE,

CASE NO. 12cv1635-GPC(BGS)

Plaintiff,

VS.

PATRICK KELLY, an individual, et al.,

**ORDER GRANTING  
DEFENDANTS' MOTION TO  
DISMISS IN PART AND  
DENYING DEFENDANTS'  
MOTION TO DISMISS IN PART**

[Dkt. Nos. 46-1, 54, 59.]

## Introduction

Before the Court is Defendants City of El Cajon and Jeff Davis' (collectively, "Defendants") motion to dismiss. Plaintiff filed an opposition and Defendants filed a reply. The motion is submitted on the papers without oral argument pursuant to Civil Local Rule 7.1(d)(1). After a review of the briefs, supporting documentation, and applicable law, the Court **DENIES** Defendants' motion to dismiss with respect to the second claim for relief under 42 U.S.C. § 1983, and **GRANTS** the motion to dismiss with prejudice with respect to the four state law claims for relief.

## Procedural Background

On June 29, 2012, Plaintiff Maurice Peter Eunice filed a complaint against Defendants. (Dkt. No. 1.) On October 1, 2012, Plaintiff filed a first amended complaint (“FAC”) against Defendants United States of America; Patrick Kelly; Patrick

1 Ryan; Mike Mervos; Bethany Watrous; Steve M. Kingkade; Jeff Davis; City of El  
2 Cajon; and City of La Mesa. (Dkt. No. 10.)

3 On October 16, 2012, Defendant United States of America filed a motion to  
4 dismiss. (Dkt. No. 17.) On November 30, 2012, the Court granted Plaintiff's *ex parte*  
5 motion dismissing United States of America, Patrick Ryan, Patrick Kelly, Mike  
6 Mervos, Steve Kingkade and Bethany Waltrous ("Federal Defendants") from the third,  
7 fourth, fifth, and sixth causes of action without prejudice. (Dkt. No. 25.)

8 On October 31, 2012, Defendants City of El Cajon and Jeff Davis filed a motion  
9 to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). (Dkt. No. 21.)

10 On February 4, 2013, the City of La Mesa filed a motion to dismiss pursuant to  
11 Federal Rule of Civil Procedure 12(b)(6). (Dkt. No. 38.)

12 On February 26, 2013, the Court granted the motions to dismiss of both the  
13 Federal Defendants' and the Defendants City of El Cajon and Jeff Davis, granting  
14 Plaintiff sixty (60) days leave to file a second amended complaint. (Dkt. No. 40.)

15 On March 1, 2013, Plaintiff filed a second amended complaint. ("SAC"). (Dkt.  
16 No. 41).<sup>1</sup> On March 15, 2013, the City of El Cajon and Jeff Davis filed a motion to  
17 dismiss the SAC pursuant to Federal Rule of Civil Procedure 12(b)(6). (Dkt. No. 46.)  
18 On May 3, 2013, Plaintiff filed an opposition. (Dkt. No. 54.) On May 17, 2013,  
19 Defendants City of El Cajon and Jeff Davis filed a reply. (Dkt. No. 59.)

20 On May 9, 2013, the Court granted the parties' joint motions to dismiss  
21 Defendant La Mesa from all causes of action and Defendant City of El Cajon from the  
22 third cause of action without prejudice. (Dkt. Nos. 57, 58.)

### 23 **Background**

24 According to the SAC, Plaintiff has owned the commercial properties at  
25 419/421/423 El Cajon Boulevard in El Cajon, CA since 1995. (Dkt. No. 41, SAC ¶  
26 29.) He initially leased the property to a taco shop that eventually expanded and moved  
27 out. (Id. ¶ 30.) In 1996, Plaintiff began leasing the properties to the Hells Angels

28 <sup>1</sup> On March 4, 2013, due to Plaintiff's recently filed SAC, the Court denied the City of La  
Mesa's motion as moot. (Dkt. No. 42.)

1 Motorcycle Club as a clubhouse. (*Id.* ¶ 31.) On August 2, 2011, Defendant Patrick  
2 Ryan of the Drug Enforcement Agency (“DEA”) obtained a search warrant for the  
3 properties. (*Id.* ¶ 32.) The DEA agents went to the properties with El Cajon and La  
4 Mesa police officers. (*Id.* ¶ 33.) Defendants knew that Plaintiff owned the properties,  
5 knew Plaintiff’s contact information, and knew how to obtain the keys to the properties.  
6 (*Id.* ¶ 35.) Instead of calling Plaintiff, Defendants blew up the doors and windows  
7 using explosives. (*Id.* ¶ 34.) Plaintiff contends that Defendants had no reason to blow  
8 up Plaintiff’s property and acted out of malice in order to intimidate Plaintiff for leasing  
9 properties to Hells Angels because Defendants held ill will towards members of that  
10 group. (*Id.* ¶ 36.)

Defendants caused extensive damage to the frame and foundation of the buildings as well as the water pipes that ran beneath the properties. (*Id.* ¶ 39.) In addition, a three year old dog, Molly, was in the courtyard of the properties, and after the explosion, Defendants let Molly run out of the property and into the traffic on the street. (*Id.* ¶¶ 40, 41.) Once Defendants gained entry into the properties, they continued their destruction by smashing windows, throwing photographs off of the walls, and stepping on the faces of the people depicted in the photographs. (*Id.* ¶ 42.)

18 As to Defendant Jeff Davis, Plaintiff's second claim for relief asserts a 42 U.S.C.  
19 § 1983 claim alleging a violation of the Fourth Amendment for an unreasonable  
20 seizure. (SAC ¶¶ 63-79.) Plaintiff also alleges Davis, along with the City of El Cajon,  
21 are liable for intentional infliction of emotional distress, negligence, and violation of  
22 California Civil Code § 52.1. (Id.)

## Discussion

24 Defendants move to dismiss, pursuant to Federal Rule of Civil Procedure  
25 12(b)(6), all claims against them. Plaintiff opposes.

## 26 A. Legal Standard for Federal Rule of Civil Procedure 12(b)(6)

27       Federal Rule of Civil Procedure 12(b)(6) permits dismissal for “failure to state a  
28 claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). Dismissal under

1 Rule 12(b)(6) is appropriate where the complaint lacks either a cognizable legal theory  
2 or sufficient facts to support a cognizable legal theory. See Balistreri v. Pacifica Police  
3 Dep’t., 901 F.2d 696, 699 (9th Cir. 1990). If, taking all well-pleaded factual allegations  
4 as true, a complaint contains enough facts to “state a claim to relief that is plausible on  
5 its face,” it may survive a motion to dismiss. Ashcroft v. Iqbal, 556 U.S. 662, 678  
6 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). In order to  
7 state a facially plausible claim for relief, the factual allegations of the claim must permit  
8 “the court to draw the reasonable inference that the defendant is liable for the  
9 misconduct alleged.” Id. However, “[t]hreadbare recitals of the elements of a cause of  
10 action, supported by mere conclusory statements, do not suffice.” Id. “In sum, for a  
11 complaint to survive a motion to dismiss, the non-conclusory factual content, and  
12 reasonable inferences from that content, must be plausibly suggestive of a claim  
13 entitling the plaintiff to relief.” Moss v. U.S. Secret Serv., 572 F.3d 962, 969 (9th Cir.  
14 2009) (quotations omitted). Further, in reviewing a Rule 12(b)(6) motion, the Court  
15 accepts as true all facts alleged in the complaint and draws all reasonable inferences in  
16 favor of the plaintiff. al-Kidd v. Ashcroft, 580 F.3d 949, 956 (9th Cir. 2009).

17 Where the court grants a motion to dismiss, “leave to amend should be granted  
18 ‘unless the court determines that the allegation of other facts consistent with the  
19 challenged pleading could not possibly cure the deficiency.’” DeSoto v. Yellow  
20 Freight Sys., Inc., 957 F.2d 655, 658 (9th Cir. 1992) (quoting Schreiber Distrib. Co. v.  
21 Serv-Well Furniture Co., 806 F.2d 1393, 1401 (9th Cir. 1986)). In other words, if  
22 granting leave to amend would be futile, the Court may deny leave to amend. See id.

23 **B. Second Claim for Relief for Violation of Plaintiff’s Fourth Amendment**  
24 **Constitutional Rights as to Defendant Jeff Davis - 42 U.S.C. § 1983**

25 Defendant Jeff Davis (“Davis”) argues that Plaintiff failed to state a plausible  
26 claim for relief against him because the factual allegations in the SAC demonstrate as a  
27 matter of law that his actions were reasonable. In his opposition, Plaintiff contends that  
28 the SAC provides sufficient allegations to entitle him to relief, and the issues disputed

1 by Defendants are questions of fact appropriate for jury determination. Because  
2 Plaintiff's SAC alleges sufficient facts to sustain a plausible legal theory, Defendant  
3 Davis's motion to dismiss Plaintiff's second claim for relief is **DENIED**.

4 Plaintiff alleges Defendant Davis violated his constitutional right under the  
5 Fourth Amendment to be free of "unnecessarily destructive behavior, beyond that  
6 necessary to execute a warrant effectively" and caused an objectively unreasonable  
7 seizure of his property by executing the search warrant in an unreasonable manner.  
8 (Dkt. No. 41 ¶ 71.) Specifically, Plaintiff contends that the use of explosives to blow  
9 up the entrance to the properties was an unreasonable execution of the search warrant.  
10 (SAC ¶¶ 66, 70.) He also asserts that the destruction of the doors and windows  
11 meaningfully interfered with the possessory interest in his property. (*Id.* ¶ 68.)

12 In order to prevail on his unlawful seizure claim arising under 42 U.S.C. § 1983,  
13 Plaintiff must establish that Davis, (1) deprived him of his Fourth Amendment right to  
14 be free from unreasonable seizures by unreasonably seizing Plaintiff's "persons,  
15 houses, papers [or] effects," (2) while acting under color of state law. See Soldal v.  
16 Cook Cnty., Ill., 506 U.S. 56, 60-63, n. 6 (1992). "A 'seizure' of property occurs when  
17 'there is some meaningful interference with an individual's possessory interests in  
18 that property.'" *Id.* at 63 (citing United States v. Jacobsen, 466 U.S. 109, 113 (1984)).  
19 Determining the reasonableness of a seizure entails a careful balancing of the nature  
20 and quality of the intrusion on an individual's Fourth Amendment interests weighed  
21 against the countervailing governmental interests at stake, such as investigating and  
22 preventing crime. United States v. Ankeny, 502 F.3d 829, 836 (9th Cir. 2007) (quoting  
23 Graham v. Connor, 490 U.S. 386, 396 (1989)).

24 "A seizure becomes unlawful when it is 'more intrusive than necessary.'" San  
25 Jose Charter of Hells Angels Motorcycle Club v. San Jose, 402 F.3d 962, 975 (9th Cir.  
26 2005) (citing Florida v. Royer, 460 U.S. 491, 504 (1983)). In examining whether an  
27 officer executed a warrant unreasonably, "it is proper to consider both the purpose  
28 disclosed in the application for a warrant's issuance and the manner of its execution,"

1       ~~id.~~, because “[t]he standard of reasonableness embodied in the Fourth Amendment  
2 demands that the showing of justification match the degree of intrusion.” Berger v.  
3 New York, 388 U.S. 41, 70 (1967) (Stewart, J., concurring). The reasonableness of the  
4 seizure “must be judged from the perspective of a reasonable officer on the scene,  
5 rather than with the 20/20 vision of hindsight.” Graham, 490 U.S. at 396. Thus, the  
6 Court examines whether the totality of the circumstances, “viewed objectively, justify  
7 [the challenged] action,” Scott v. United States, 436 U.S. 128, 138 (1978), recognizing  
8 that “the Fourth Amendment regulates **conduct** *rather than thoughts*,” Ashcroft, 131 S.  
9 Ct. at 2080 (emphasis added).

10       The Court may not dismiss Plaintiffs’ claims at this point because the  
11 reasonableness of a seizure is a question of fact appropriate for jury determination.  
12 Howell v. Polk, 532 F.3d 1025, 1026 (9th Cir. 2008); see also Hydrick v. Hunter, 500  
13 F.3d 978, 993 (9th Cir. 2007) cert. granted, judgment vacated on other grounds, 556  
14 U.S. 1256 (2009), 669 F.3d 937 (9th Cir. 2012) (“[t]he ‘reasonableness’ of a search or  
15 seizure is a fact-intensive inquiry that cannot be determined at this stage”); see also  
16 Liston v. Cnty. of Riverside, 120 F.3d 965, 979 (9th Cir. 1997) (Ordinarily, “the  
17 reasonableness of a search or seizure is a question of fact for the jury”). The Court  
18 cannot “make such a fact-specific determination when the precise circumstances of the  
19 searches or seizures are not before the court and when the Defendants have not yet had  
20 a chance to justify the alleged searches or seizures.” Hydrick, 500 F.3d at 993. Here, at  
21 this stage of the proceeding, the Court must only determine whether the SAC alleges a  
22 claim of a violation of Plaintiff’s Fourth Amendment right against unreasonable  
23 seizure, not whether the seizure was reasonable. Because Plaintiff’s allegations in the  
24 SAC state a claim for a violation of the Fourth Amendment against Davis, Plaintiff has  
25 sufficiently pled an alleged Fourth Amendment violation against Davis for an  
26 unreasonable seizure sufficient to survive a motion to dismiss.<sup>2</sup> See Hydrick, 500 F.3d

27       <sup>2</sup> In his moving papers, Davis raises the issue of standing. With respect to allegations of damage  
28 to his personal property located within the interior of the property, Plaintiff set forth no allegations of damage  
to Molly, the dog, and/or personal property damaged during the search within his second  
claim for relief, and even if he did, he likewise failed to allege a possessory interest in such items.

1 at 993.

2 Davis also alleges that the seizure was reasonable pursuant to 18 U.S.C. § 3109.  
3 18 U.S.C. § 3109 provides that where an officers gives notice of his authority and  
4 purpose, but is subsequently refused admittance,<sup>3</sup> he or she “may break open any outer  
5 or inner door or window of a house, or any part of a house, or anything therein, to  
6 execute a search warrant.” See 18 U.S.C.A. § 3109. While an officer may break open  
7 any outer door or window of a house, there is a question of fact whether using  
8 explosives to break open an outer door is “reasonable.” Therefore, in a 12(b)(6) motion  
9 to dismiss, the Court does not make such findings.

10 Accordingly, the Court **DENIES** Defendant Davis’ motion to dismiss the second  
11 claim for relief for violation of the Fourth Amendment pursuant to 42 U.S.C. § 1983.

12 **C. Third Claim for Relief for Failure to Supervise and Discipline as to**  
13 **Defendants City of El Cajon - 42 U.S.C. § 1983**

14 On May 9, 2013, the Court granted the joint motion to dismiss the third cause of  
15 action against the City of El Cajon (the “City”) without prejudice from all causes of  
16 action within the SAC. (Dkt. No. 57.) Accordingly, the Court **DENIES** the City’s  
17 motion to dismiss as moot.

18 **D. Remaining State Law Claims for Relief as to Defendants Davis and the City**  
19 **of El Cajon**

20 The Court’s prior order concluded that California Government Code section  
21 821.6 immunized both the officers, and by operation of California Government Code  
22 section 815.2(b), the City from damage claims arising out of the Defendants’ use of  
23 explosives when entering the properties, noting that this immunization extended to  
24 Plaintiff’s state law causes of action for intentional infliction of emotional distress,

25 Accordingly, the Court is not required to address such claims. Further, any loss caused to the  
26 Plaintiff’s personal property located within the real property which he leased out to tenants should be  
27 remedied by a cause of action against the tenants, rather than the police officers who conducted the  
28 search.

<sup>3</sup> “Refused admittance” may include constructive or implied refusal, rather than an affirmative  
refusal, and “a mere lack of response after a reasonable interval of time has elapsed has been held to  
be the statutory equivalent of a refusal justifying the officer’s use of force to enter.” 21 A.L.R. Fed.  
820 (Originally published in 1974).

1 negligence, conversion, and violation of California Civil Code § 52.1. (Dkt. No. 40.)

2 Plaintiff alleges state causes of action for intentional infliction of emotional  
3 distress, negligence, conversion, and violation of California Civil Code section 52.1.  
4 Except for the negligence claim, the state law claims for relief allege facts arising after  
5 the Defendants' use of explosives. Defendants argue these state law claims are barred  
6 as a matter of law as they are immune under California Government Code sections  
7 815.2 and 821.6, as has previously been established by this Court's prior order.  
8 Moreover, they also argue that the SAC fails to state a claim against them as to each  
9 state cause of action as well as that each claim fails to comply with the California  
10 Government Claims Act (also known as the California Tort Claims Act) (the "CGCA").  
11 Plaintiff opposes, arguing that the officers are only immune for the loss which arose  
12 during the investigation, but not for the loss arising from their "acts of destruction after  
13 Defendants entered the building." (Dkt. No. 54.) He also rebuts Defendants'  
14 arguments by contending that because the CGCA only requires a general description of  
15 the damage or loss, his complaint is not barred by the CGCA.

16 The CGCA immunizes public entities from tort liability unless a particular statute  
17 has explicitly created liability. Cal. Gov't Code § 815(a). In order to bring a suit for  
18 money damages against a public entity or its employees, the CGCA requires that prior  
19 to filing suit, a claimant must file and present a written claim to the public entity, and  
20 that the public entity must either act upon or reject the claim. Cal. Gov't Code § 945.4.  
21 A claim relating to a cause of action for injuries to personal property, such as Plaintiff's  
22 claim, must be presented within six months after the accrual of the cause of action. Cal.  
23 Gov't Code § 911.2(a). However, a party may make an application to present such a  
24 claim after the expiration of the six month period, provided the claimant presents an  
25 application to present a late claim within a reasonable time period, not to exceed one  
26 year after the accrual of the cause of action, Cal. Gov't Code § 911.4(a)-(b), and which  
27 includes one of the listed reasons for late presentation of the claim, including but not  
28 limited to excusable neglect, Cal. Gov't Code § 911.6(b)(1). However, where the

failure to present a claim is attributable to an excuse such as inadvertence or excusable neglect, the claimant's failure to timely present the claim within the period provided by Government Code section 911.2 must not prejudice the public entity in its defense of the claim. Cal. Gov't Code § 911.6(b)(1). Compliance with the CGCA is mandatory, rather than a simple procedural requirement, and failure to comply may prove fatal to a cause of action. See Mangold v. Cal. Pub. Utilities Comm'n, 67 F.3d 1470, 1477 (9th Cir. 1995) (The California Tort Claims Act requires the timely presentation and filing of a written claim, and a rejection of that claim in whole or in part, "as a condition precedent to suit against a public entity"); Lindsay v. Fryson, 2011 U.S. Dist. LEXIS 62834, 27-28, 2011 WL 2444813 (E.D. Cal. June 14, 2011) (while "[a] plaintiff's 'failure to allege facts demonstrating or excusing compliance with the claims presentation requirement subjects a claim against a public entity' to dismissal for failure to state a claim," a court need not resolve factual disputes regarding actual compliance with the CGCA when ruling on a Rule 12(b)(6) motion).

Defendants are part of a public entity. See Cal. Gov't Code § 811.2 ("Public entity" includes the state . . . a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the State."); see also Streit v. County of L.A., 236 F.3d 552, 565 (9th. Cir. 2001) (relying on California decisions holding that a police department is a public entity under section 811.2); Willis v. Reddin, 418 F.2d 702, 704 (9th Cir. 1969) (holding that Cal. Gov. Code section 950.2 bars action against a public employee where failure to comply with the presentation requirement bars action against public entity for same injuries). Because Defendants qualify as a public entity, Plaintiff was required to comply with the CGCA's claims presentation requirement.

In Sanwal v. County of Sacramento, 2011 U.S. Dist. LEXIS 69386, 17-26 (E.D. Cal. June 27, 2011), the Eastern District Court of California granted the police department's motion to dismiss without prejudice, finding the plaintiffs' failure to allege an authorizing statute permitting them to bring state law tort claims against the

1 city police department fatal. However, it granted leave to amend to specify which  
2 authorizing statute, if any, authorized their claims. The court also noted that timely  
3 presentation of claims to the public entity “is not merely a procedural requirement but is  
4 an element of the plaintiff’s cause of action.” *Id.* (citing Shirk v. Vista Unified Sch.  
5 Dist., 42 Cal. 4th 201, 209 (2007)). Like the Sanwal plaintiffs, Plaintiff has also failed  
6 to allege an authorizing statute as well as failed to timely present portions of his claim,  
7 as discussed in more detail below.

8 In Karim-Panahi v. Los Angeles Police Department, 839 F.2d 621, 627 (9th. Cir.  
9 1988), abrogated in part as stated in Boarman v. County of Sacramento, 2013 U.S. Dist.  
10 LEXIS 46326, 2013 WL 1326196, 7 (E.D. Cal. Mar. 29, 2013), the Ninth Circuit held  
11 that Plaintiff Karim-Panahi’s amended complaint failed to allege compliance with  
12 California tort claim procedures, and as a result, it concluded the lower court  
13 appropriately dismissed his state law tort claims. It found Karim-Panahi’s pendent state  
14 law claims against both individual and public entity defendants barred absent proof he  
15 presented them to the city and the police department before commencing suit. *Id.*  
16 (citing Cal. Gov’t Code §§ 905, 945.4, 950.2); see also Ortega v. O’Connor, 764 F.2d  
17 703, 707 (9th Cir. 1985), rev’d on other grounds, 480 U.S. 709 (1987) (a plaintiff’s  
18 failure to comply with the CGCA’s filing requirements bars pendent state claims).  
19 However, while the Court concluded that the lower court erred by failing to instruct  
20 Karim-Panahi on the necessity of alleging compliance with the exhaustion  
21 requirements, it also held noted that leave to amend is unnecessary where it is clear the  
22 deficiencies of the compliant cannot be cured by amendment. See id.

23 Like the plaintiff in Karim-Panahi, Plaintiff’s state law claims are subject to the  
24 claim presentation requirements of the CGCA. Further, also similar to Karim-Panahi,  
25 because Plaintiff failed to allege compliance with these requirements, this Court must  
26 dismiss Plaintiff’s state law claims.

27 Further, Defendants correctly point out that this Court already dismissed with  
28 prejudice any claims related to property damage arising due to the use of explosives to

1 enter the building. (Dkt. No. 40, 7:7-11.) Yet, in Plaintiff's fifth claim for negligence,  
2 he has again included allegations relating to the use of explosives while executing the  
3 search warrant. (SAC at ¶ 106.) Accordingly, any claims for relief alleging harm to  
4 Plaintiff's real property arising from the use of explosives when executing the search  
5 warrant will fail and must be dismissed.

6 Moreover, on his initial claim form to the City of El Cajon, Plaintiff provided  
7 that the full extent of his injuries include "Damage to the doors, windows, flooring and  
8 the structure of the property. Damage to the interior of the property *from the*  
9 *explosion.*" (Dkt. No. 46-2, Exhibit A.) (emphasis supplied) Plaintiff must exhaust his  
10 administrative remedies prior to seeking judicial action. Because Plaintiff claim  
11 requests damages for damage to the interior of the property arising "from the  
12 explosion," and this Court's prior order dismissed any state law claims arising out of  
13 the use of explosives to execute the search warrant, Plaintiff's claims related to the  
14 damage to the interior property must be dismissed *with prejudice* for two reasons: First,  
15 in order for Plaintiff to bring claims relating to the interior of the property *not* arising  
16 out of the explosion, he would need to refile his claims with the public entity in order to  
17 satisfy the exhaustion requirement. However, he cannot do so as the period to file a late  
18 application has expired because his cause of action accrued on August 2, 2011, and as a  
19 result, the one year time period within which to make an application to present a late  
20 claim has passed. See Cal. Gov. Code § 911.4(a)-(b). Thus, while he may have been  
21 able to plead excusable neglect, he is well over the one year deadline. Second, if  
22 Plaintiff is unable to refile and obtain a decision by the public entity relating to damage  
23 to the interior of the property arising out of conduct unrelated to the use of explosives,  
24 he cannot bring a cause of action for such damages in the district court because he has  
25 not exhausted his remedies in compliance with the CGCA, which represents a  
26 prerequisite element of his claim for relief. Thus, as in Karim-Panahi, Plaintiff's state  
27 law claims for relief should be dismissed without leave to amend because he will be  
28 unable to cure the deficiencies in an amended complaint.

Finally, Plaintiff's fourth claim for relief for intentional infliction of emotional distress alleges that Defendants caused Plaintiff to suffer emotional distress by damaging the photographs, forcing the dog "to suffer fear needlessly by placing the explosives near the courtyard where the dog lived, causing her physical harm," and by allowing the dog to run into the street, and that these acts were done with the purpose of punishing Plaintiff. (SAC, ¶¶ 99, 100.) To the extent Plaintiff's claim arises from the use of explosives, it is barred. Defendants further argue that Plaintiff lacks standing to claim damages for any harm related to Molly, the dog, and/or Plaintiff's personal property. Thus, to the extent Plaintiff's claim arises from harm to Molly or photographs, Plaintiff failed to allege a possessory interest in such items in his SAC.<sup>4</sup>

Accordingly, the Court **GRANTS** Defendants' motion to dismiss Plaintiff's state law claims with prejudice due to the fact this Court's prior order precludes his claims for damage to the interior of the property arising from the use of explosives, and the presentation requirement of the CGCA bars Plaintiff from amending his complaint to allege damage to the interior of the property arising after the explosion because the period to present late claims has expired.

#### E. **Request for Judicial Notice**

Defendants filed a request for judicial notice as to the YouTube video capturing this incident and the affidavit for search warrant which has already been filed by Defendant United States of America as Dkt. No. 18-1. The Court declines to take judicial notice of these items as they were not relied upon in ruling on the instant motion to dismiss. However, the Court takes judicial notice of Plaintiff's Claim for Damages on file with the City. (Dkt. No. 46-2, Exhibit A.) See e.g., Fox v. Cnty. of Tulare, 1:11-CV-00520 AWI, 2011 WL 5101856, 8, n. 8 (E.D. Cal. Oct. 26, 2011) (citing Lee, 250 F.3d at 688-89) (Taking judicial notice of Plaintiff's claim forms pursuant to the Defendants request for judicial notice filed alongside their motion to

<sup>4</sup> However, if Defendants desire to challenge Plaintiff's constitutional standing, they must bring a motion pursuant to Rule 12(b)(1) challenging the subject matter jurisdiction of the court. In re Sony Gaming Networks & Consumer Data Sec. Breach, 903 F. Supp.2d 942, 952 (S.D.Cal. Oct.11, 2012).

dismiss, because “[c]ourts may take judicial notice of matters of public record” where not subject to reasonable dispute).

## Conclusion

Based on the above, the Court **DENIES** Defendant Davis' motion to dismiss the second cause of action, and **GRANTS** Defendants City of El Cajon and Jeff Davis' motion to dismiss the state law claims relating to the third, fourth, fifth, and sixth claims for relief with prejudice.

IT IS SO ORDERED.

DATE: July 16, 2013

Gonzalo Curiel  
HON. GONZALO P.CURIEL  
United States District Judge